No. 87-65

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE WASHINGTON POST AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The American Newspaper Publishers Association, American Society of Newspaper Editors, Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., The New York Times Company, the Reporters Committee for Freedom of the Press and The Washington Post ("Amici") move, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file a brief *amici curiae* in support of respondents. The written consents of Petitioner and Respondents have been filed with the Court.

Amici are each major broadcasting and publishing companies or associations of such companies. The American Newspaper Publishers Association is a national organization representing approximately 1,385 newspapers throughout the United States. Its membership constitutes approximately 90% of the total daily and Sunday newspaper circulation and a substantial portion of the weekly newspaper circulation in the United States. The American Society of Newspaper Editors is a

nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. Capital Cities/ABC, Inc. through subsidiaries owns and operates national television and radio networks, television and radio broadcast stations, and publishes newspapers and magazines, all of which are engaged in the gathering and dissemination of news. CBS Inc. operates radio and television networks, and is the owner of television and radio stations located in major cities throughout the United States. Through the CBS News division, CBS is engaged in the world-wide gathering of news and offers news programs to affiliated stations of its radio and television networks.

The National Broadcasting Company, Inc. owns and operates a national television network, and itself and through subsidiaries operates television and radio broadcast stations, all of which are engaged in the gathering and dissemination of news. The New York Times Company publishes The New York Times, a daily newspaper with a nationwide circulation, and thirty-five regional newspapers. The New York Times Company also publishes five magazines and owns five television stations, one cable television system and two radio stations. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to protecting the First Amendment and freedom of information interests of the news media and the public. The Washington Post publishes a daily newspaper of general circulation in the Washington, D.C. metropolitan area.

This appeal raises important issues of law under the First Amendment with respect to the circumstances under which a newspaper may be enjoined from publishing newsworthy information, and the sanctions that may be imposed against a newspaper that violates such an injunction. These issues are of great significance to Amici. Amici operate under deadline pressures and must publish or broadcast news in a timely fashion. Each would suffer irreparable harm and disruption if

its publishing or broadcast activities, or the publishing or broadcast activities of its members, were enjoined, even temporarily. Accordingly, Amici have a vital interest in protecting the First Amendment right of the press freely to publish and broadcast newsworthy information and can present to the Court a valuable perspective on the issues raised in this case.

Dated: New York, New York
December 21, 1987

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Interests of Amici Curiae

A motion for leave to file this brief is being submitted today on behalf of The American Newspaper Publishers Association, American Society of Newspaper Editors, Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., The New York Times Company, the Reporters Committee for Freedom of the Press and The Washington Post ("Amici") with the written consent of the parties pursuant to Rule 36 of

the Rules of this Court. The interests of Amici are set forth in this motion, which is bound with the brief pursuant to Rule 36. Amici have each appeared as *amicus curiae* before this Court and before other courts in cases raising issues under the First Amendment of the United States Constitution.

Statement of the Case

On November 8, 1985, Raymond Patriarca ("Patriarca") commenced the proceedings giving rise to this appeal by filing a Summons and Complaint with the United States District Court for the District of Rhode Island. The Complaint alleged in relevant part that the FBI had improperly disclosed to the Providence Journal (the "Journal"), pursuant to a Freedom of Information Act request, materials obtained as a result of illegal electronic surveillance. Simultaneously with the Summons and Complaint, Patriarca filed a motion seeking to enjoin the release of additional such materials by the FBI and to enjoin the Journal from disclosing the materials it had already received.

On November 13, 1985, the district court held a conference on Patriarca's motion, and issued a temporary restraining order, over the Journal's objections that such an order would be an unconstitutional prior restraint. The order enjoined the Journal from publishing any article with information it was alleged to have improperly received from the FBI. A hearing on the motion was scheduled for November 15, 1985.

The Journal on November 14 published an article that included information covered by the restraining order. In an accompanying article the Journal explained its view that the restraining order was an unconstitutional prior restraint.

On November 14, Patriarca filed a motion to hold the Journal in contempt, but thereafter declined to prosecute, and the district court appointed a Special Prosecutor. In the interim, on November 19, the district court vacated the restraining order and denied preliminary injunctive relief.

After the submission of stipulated facts by the Journal and Special Prosecutor, the district court entered judgment finding The Providence Journal Company and its Executive Editor, Charles M. Hauser ("Hauser"), guilty of criminal contempt. On April 2, 1986, after an additional hearing, the district court fined The Providence Journal Company $100,000, imposed a sentence of 18 months imprisonment—which was later vacated—on Hauser, and ordered Hauser to perform 200 hours of community service. The Providence Journal Company and Hauser filed a timely appeal from the district court's judgment and order.

The United States Court of Appeals for the First Circuit reversed the contempt order on December 1, 1986. The court, in an opinion by Judge Wisdom, held that under the limited exception to the collateral bar rule for "transparently invalid" orders, the Journal's violation of the district court's unconstitutional prior restraint was justified. On rehearing en banc, the court affirmed the panel's reversal of the contempt order, but added that in the future, publishers subject to prior restraints should seek emergency relief from a higher court if time permits.

Summary of Argument

This appeal requires the Court to reconcile the competing concerns of the First Amendment's prohibition against prior restraints and the collateral bar rule, which ordinarily requires adherence to court orders. Amici believe that the court of appeals reached the appropriate balance with respect to these issues. The court's opinion both protects the First Amendment right of the press to be free from unconstitutional prior restraints and reaffirms the supremacy of judicial orders over individual action. It narrowly limits the circumstances in which a newspaper or broadcaster may violate a prior restraint and raise as a defense in a subsequent contempt proceeding the unconstitutionality of that order.

In general, Amici agree with the court of appeals' statement encouraging publishers confronted with prior restraints to make a good faith effort to seek appellate review before violating those orders. As a practical matter, the harsh penalties for contempt and the risks inherent in asserting that a court order is transparently invalid assure that news publishers will not lightly decide to violate a prior restraint without first seeking appellate review. Amici also believe a blanket rule requiring publishers subject to prior restraints to exhaust their appellate remedies in all circumstances before publishing newsworthy information would be inappropriate. The importance to the public of certain news stories, for example, might be irreparably compromised by even a short delay in publication. Moreover, some newspapers and broadcasters may lack the legal resources to seek emergency appellate review on short notice. In such circumstances, a blanket rule requiring an exhaustion of appellate remedies would frustrate the First Amendment's prohibition against prior restraints and irreparably harm the free flow of information to the public that the First Amendment is designed to promote.

Argument

The Court of Appeals Correctly Held that the District Court's Restraining Order was Transparently Invalid and Could be Disregarded.

A. Transparently Invalid Injunctions may be Disregarded and Challenged in a Contempt Proceeding.

As a general rule a party must obey injunctions, and, if it believes that an injunction is improper or unwarranted, use the appellate process to challenge the disputed order. This Court has suggested, however, that under certain limited circumstances, a party may disregard an injunction and raise its invalidity as a defense in a subsequent contempt proceeding. Since the temporary restraining order issued by the district court fell within this narrow class of cases, the court of appeals

correctly held that the Journal was justified in refusing to follow that order.

In *Walker v. Birmingham*, 388 U.S. 307, 315 (1967), this Court indicated that under some circumstances a party may disregard a "transparently invalid" injunction. *Walker* involved a contempt judgment entered against the leaders of a civil rights organization who conducted a demonstration in violation of an injunction that was later held to be unconstitutional. Noting "the strong interest of local governments in regulating the use of their streets and other public places" through time, place and manner restrictions, the Court held that under the circumstances of that case, there was no reason to depart from the general rule requiring adherence to injunctions. *Id.* The *Walker* decision emphasized, however, that the case was not one "where the injunction was transparently invalid or had only a frivolous pretense to validity . . . ." *Id.* As the court of appeals in this case noted, "[t]he unmistakable import of this language is that a transparently invalid order cannot form the basis for a contempt citation." 820 F.2d at 1347.[1] Subsequent decisions have applied this narrow exception to the collateral bar rule for transparently invalid injunctions. For example, in *United States v. Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972), the court held that the collateral bar rule applied to a district court gag order absent a showing of "transparent invalidity". *See also United States v. DiMauro*, 441 F.2d 428, 436 (8th Cir. 1971).

Prior restraints are a unique form of order that fit within the limited exception for transparently invalid orders.[2] Such orders

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1 This Court has also recognized other exceptions to the collateral bar rule. For example, *United States v. Ryan*, 402 U.S. 530 (1970), held that the invalidity of an order denying a motion to quash a grand jury subpoena could be asserted as a defense in a contempt proceeding. *See also Cobbledick v. United States*, 309 U.S. 323 (1940).

2 The temporary restraining order issued by the district court was a classic prior restraint—the injunction was issued before publication and prohibited conduct protected under the First Amendment. *See Near v. Minnesota*, 283 U.S. 697 (1931).

are completely antithetical to the rights guaranteed by the First Amendment, and, accordingly, have been deemed "presumptively unconstitutional" by this Court. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 558 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 396 (1973) (Burger, C.J. dissenting)). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Prior restraints can be justified only under the most compelling circumstances, and even then only where there are no other alternatives available. *See Fantasy Book Shop, Inc. v. Boston*, 652 F.2d 1115, 1120 (1st Cir. 1981) (prior restraint is only justifiable where, in addition to promoting an important state interest, it is the least restrictive alternative available).

In addition, this Court has held that the "loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This irreparable harm, together with the presumptive unconstitutionality of prior restraints, indicates that such orders are encompassed within the limited exception to the collateral bar rule. Ordinarily a party subject to an unconstitutional order—even a transparently invalid order—can obtain complete relief by challenging the order on appeal. If a publisher follows a prior restraint, however, complete relief is not possible even if the order is reversed on appeal, because the interim delay in publication itself constitutes irreparable injury. Accordingly, prior restraints are among the narrow class of orders that may be disregarded and challenged in a subsequent contempt proceeding.

This Court's decision in *Thomas v. Collins*, 323 U.S. 516 (1945), although decided before *Walker*, indicates that prior restraints on speech are among the narrow class of orders the validity of which may be challenged in a contempt proceeding. In *Thomas*, a temporary restraining order that prohibited a union organizer from soliciting union memberships was viewed

as an unconstitutional prior restraint, and the defendant, who subsequently violated that order, successfully challenged its validity when he was prosecuted for contempt. *See In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979); *Glen v. Hongisto*, 438 F. Supp. 10, 13-14 (N.D. Cal. 1977).

State court decisions also demonstrate that prior restraints of pure speech may be challenged as transparently invalid in a contempt proceeding. In *State ex rel. Superior Court v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608 (1971), *cert. denied*, 404 U.S. 939 (1971), for example, the Washington Supreme Court held that two journalists were justified in violating a gag order because the order was patently invalid under the First Amendment. Similarly, in *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213, 217 (1972), the Arkansas Supreme Court reversed judgments of contempt entered against a newspaper and its executive editor based upon their violation of an unconstitutional restraining order. *See also In re Berry*, 68 Cal. 2d 137, 436 P.2d 273, 281 (1968); *Cooper v. Rockford Newspapers, Inc.*, 50 Ill. App. 3d 250, 365 N.E.2d 746, 751 (2d Dist. 1977). These decisions emphasize that unlike restraining orders that primarily prohibit conduct—such as the injunction in *Walker v. Birmingham*, where the impairment of First Amendment rights had to be balanced against the state's legitimate interest in regulating the use of public property—prior injunctions against pure speech can virtually never be justified, and accordingly, are almost always transparently invalid. *See, e.g., Cooper v. Rockford Newspapers, Inc.*, 365 N.E.2d at 751.

B. The Restraining Order was Transparently Invalid.

The district court's order was presumptively unconstitutional as a prior restraint, and since the order was issued without any legitimate justification to rebut that presumption, it was a transparently invalid order that could be disobeyed.

The precise circumstances under which prior restraints may be justified remain unclear, because every direct prior restraint on pure speech that has been reviewed by this Court has been

declared unconstitutional. Indeed, this Court has indicated that a prior restraint might be justified only under the most extreme circumstances, such as an announcement of the sailing time and route of a troop ship, already at sea, during a time of war, *Near v. Minnesota*, 283 U.S. at 716, or the disclosure of other information that would "surely result in direct, immediate, and irreparable damage to our Nation or its people." *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J. concurring). Of course, the circumstances of the present case do not begin to approach the extreme exigencies of the hypothetical situation described in *Near*, or satisfy the standard enunciated by Justice Stewart. Accordingly, there was no basis for the district court's order.[3]

It was patently clear from Patriarca's complaint that he could not sustain his burden of proving that the restraint was justified under the circumstances. *See New York Times Co. v. United States*, 403 U.S. at 714; *id.* at 726-27 (Brennan, J. concurring) (proponent must allege and prove "that publication must inevitably, directly, and immediately cause" the event that justified the restraint); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. at 419. Indeed, this Court has already held that the rationale asserted by Patriarca—that disclosure of the information covered by the court's order could prove embarrassing or infringe upon his privacy rights—is an insufficient basis for a prior restraint. *Organization for a Better Austin v. Keefe*, 402 U.S. at 419-20.[4] Rather than

3 The district court's failure to find that a prior restraint would be effective or that no less extreme measures were available further demonstrates that the court's order was transparantly invalid. *See Nebraska Press Association v. Stuart*, 427 U.S. at 562-68.

4 Although Petitioner argues that the purported impairment of Patriarca's privacy rights justified the prior restraint, it ignores this Court's decision in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), which held that such an infringement of privacy rights cannot justify a prior restraint. A prior restraint is facially unconstitutional unless it "fit[s] within one of the narrowly defined exceptions to the prohibition against prior restraints," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), and *Keefe* precludes any reliance on Patriarca's privacy rights to justify the restraining order.

attempting to restrain the offending publication, Patriarca's remedy was limited to a subsequent action for damages—an alternative he did not pursue. *See Near v. Minnesota*, 283 U.S. at 720; *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904, 907 (9th Cir. 1978). Moreover, Patriarca's vague and unsubstantiated assertions of potential harm are insufficient. *See New York Times Co. v. United States*, 403 U.S. at 714; *see also id.* at 725-26 (Brennan, J. concurring) ("the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result").

Because of its unrebutted presumptive invalidity the restraining order was transparently invalid. As a prior restraint, the order would also have irreparably harmed the Journal. The court of appeals therefore correctly determined that the order could be disregarded by the Journal.

C. The Reasons Advanced by Petitioner in Support of the District Court's Order are Inadequate.

Petitioner seeks to minimize the heavy presumption of unconstitutionality that accompanies prior restraints to bolster its assertion that the district court's order was not transparently invalid. Petitioner's brief at 35-43. The authorities relied on by Petitioner, however, do not support its position. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), both concern the inherent power of a court to regulate the conduct of parties and prevent abusive conduct in cases before it. *Seattle Times Co.*, for example, involved a discovery order, and the Court emphasized that the disputed order "both granted [the newspaper] access to that information and placed restraints on the way in which the information might be used." 467 U.S. at 32. *Gulf Oil Co.*

concerned an order regulating the conduct of class counsel and class representatives. Neither decision, however, provides any support for the issuance of an injunction against the disclosure by a news publisher of information independently obtained by that publisher.

Petitioner also relies on *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), but fails to note that it involved a post-publication action for damages, and not a prior restraint. An injunction was issued in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987), but the materials at issue were copyrighted, and this Court has indicated that because of the Copyright Clause of the Constitution, copyrighted works may be subject to different treatment under the First Amendment. *See New York Times Co. v. United States*, 403 U.S. at 731 n.1 (White, J., concurring). *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575 (1969), on which Petitioner also relies, is distinguishable because the speech at issue there constituted a threat of retaliatory discharge proscribed by the National Labor Relations Act, and was therefore an unfair labor practice unprotected by the First Amendment.[5] *See New York Times Co. v. United States*, 403 U.S. at 731 n.1 (White, J., concurring) (distinction under First Amendment between NLRB injunctions against private parties and injunctions against publication by press). Finally, Petitioner's reliance on *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1975), and *National Commission on Egg Nutrition v. Federal Trade Commission*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978), is misplaced, because those cases concern commercial speech, which this Court has held may be subject to different restrictions than the pure speech that the district court enjoined. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985).

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5 Substantively illegal conduct, of course, is not immunized by the First Amendment merely because it is accomplished in whole or in part through speech.

In its brief, Petitioner also relies on a purported conflict between the Fourth Amendment and the First Amendment to justify the restraining order. However, as the court of appeals correctly held, the Fourth Amendment is not even implicated in this case because the Fourth Amendment does not apply to private parties. "This Court has . . . consistently construed this protection as proscribing only governmental action . . . ." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also United States v. Calandra*, 414 U.S. 338, 354 (1974) ("purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects."). There is no conflict between the First and the Fourth Amendments, because the Fourth Amendment does not apply to a private party such as the Journal and did not prevent it from publishing the material about Patriarca.

Petitioner also relies on the flawed premise that the restraining order was justified as an interim measure to preserve the "status quo" until the district court could review the materials in question and make a determination concerning the harm that might result from their disclosure. Allowing a party to obtain a prior restraint to preserve the "status quo" is wholly unjustified because it would undermine the presumption of unconstitutionality that accompanies prior restraints. *See Nebraska Press Association v. Stuart*, 427 U.S. at 558. This is particularly true where—as in the present case—the party seeking the restraint has no colorable basis for such an order.

Moreover, the very characterization of a restraining order against the publication of news as preserving the status quo is misleading, because the news is a dynamic and constantly changing commodity.[6] Restraining publication under such cir-

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6 Petitioner's additional argument that the prior restraint was justifiable because of its short duration, is equally wrong and misconstrues the protections embodied in the First Amendment. This Court has held that the length of time for which a prior restraint is in effect is not relevant to its constitutionality, because every prior restraint has an "immediate and irreversible" impact and constitutes irreparable injury.

(*footnote continued*)

cumstances only serves the unconstitutional purpose of halting the dissemination of protected speech. This principle is particularly true with respect to prior restraints directed at the news media, since news which is not published or broadcast immediately frequently loses its significance to the public. For example, news articles concerning incipient events such as an election, the confirmation of a public official or a legislative vote may become completely moot if publication is delayed for even a brief period of time. Yet, in any of these situations an individual could seek to enjoin or delay publication of an embarrassing article relying on allegations—such as those raised by Patriarca—that his privacy has been invaded. A rule that precluded raising the unconstitutionality of a prior restraint as a defense in a subsequent contempt proceeding would undermine the presumed unconstitutionality of restraining orders, and as a practical matter constitutes the enforcement of prior restraints and gives rise to the "irreparable injury" to First Amendment rights condemned in *Elrod*.

There have been circumstances in which newspapers and broadcasters have delayed publication and sought review of restraining orders. This Court, however, should not impose a blanket rule requiring adherence in all circumstances to transparently invalid prior restraints pending appellate review. *See Goldblum v. National Broadcasting Corp.*, 584 F.2d at 907 ("A broadcaster or publisher should not . . . be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt."). News publishers will not lightly decide to disregard a prior restraint, because in doing so they must assume the risk that a reviewing court will

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Elrod v. Burns, 427 U.S. at 373; *see New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Association v. Stuart*, 427 U.S. at 559 ("the burden on the [party seeking the restraint] is not reduced by the temporary nature of a restraint.").

disagree with their judgment that the order was transparently invalid. The threat of contempt, and the unavailability under *Walker* of a good faith defense, assures that in all but the most egregious cases publishers will not violate prior restraints.[7] Moreover, in many cases the limited legal resources available to a newspaper or broadcaster on short notice may foreclose the possibility of an immediate, emergency appeal. In such situations, a rule conditioning the *Walker* exception on the exhaustion of appellate remedies would, as a practical matter, require adherence to prior restraints.

A blanket rule requiring adherence to prior restraints pending appellate review is also inappropriate because in many cases the significance to the public of news stories will be irretrievably lost if they are not published immediately.[8] For example, articles concerning pending legislation or the subject of a confirmation hearing may have significance to the public only if they are published immediately.

There was no basis for issuing a prior restraint in this case. The reasons advanced in support of the order were legally

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7 The threat of contempt is in addition to any possible threat of liability for publishing in violation of the legal rights of the party seeking the prior restraint.

8 For this reason, even if some attempt to seek appellate review were generally held to be a prerequisite to challenging the validity of a prior restraint in a contempt proceeding, no more than a good faith effort to obtain emergency relief prior to publication should be required. Indeed, the *en banc* court in the instant case, suggesting that publishers generally seek emergency relief from unconstitutional prior restraints, explicitly noted "[i]f timely access to the appellate court is not available or if timely decision is not forthcoming, the publisher may then proceed to publish and challenge the constitutionality of the order in the contempt proceeding." 820 F.2d at 1355 (footnote omitted). Similarly, this Court suggested in *Walker* that the collateral bar rule might not apply where a party faced with an unconstitutional prior restraint met with "delay and frustration" in seeking judicially to vindicate its First Amendment rights. 388 U.S. at 318.

inadequate, and accordingly, the presumption of unconstitutionality was not overcome. Moreover, adherence to the prior restraint would have constituted irreparable harm. Under these circumstances, the court of appeals correctly held that the order was transparently invalid and could be challenged in the contempt proceeding.

Conclusion

For the foregoing reasons, the order of the court of appeals should be affirmed.

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I, James C. Goodale, a member of the Bar of this Court, hereby certify that I caused three copies of the annexed Motion for Leave to File Brief as Amici Curiae and Brief of The American Newspaper Publishers Association, American Society of Newspaper Editors, Capital Cities/ABC, Inc., CBS, Inc., National Broadcasting Company, Inc., The New York Times Company, The Reporters Committee for Freedom of the Press and The Washington Post as Amici Curiae in Support of Respondents, to be served on December 21, 1987, by U.S. Mail, postage prepaid, upon the following counsel:

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